



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Sex and gender equality law and policy

Citation for published version:

Cowan, S, Giles, HJ, Hewer, R, Kaufmann, B, Kenny, M, Morris, S & Nicoll Baines, K 2020, 'Sex and gender equality law and policy: A response to Murray, Hunter Blackburn and MacKenzie', *Scottish Affairs*, pp. 1-20. <https://doi.org/10.3366/scot.2020.0347>

Digital Object Identifier (DOI):

[10.3366/scot.2020.0347](https://doi.org/10.3366/scot.2020.0347)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Scottish Affairs

Publisher Rights Statement:

This is an Accepted Manuscript of an article published by Edinburgh University Press in Scottish Affairs. The Version of Record is available online at: <https://www.eupublishing.com/doi/abs/10.3366/scot.2020.0347>

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Sex and Gender Equality Law and Policy: a response to Murray, Hunter Blackburn and MacKenzie

Sharon Cowan, Harry Josephine Giles, Rebecca Hower, Becky Kaufmann, Meryl Kenny, Sean Morris and Katie Nicoll Baines

Abstract

This article is a response to ‘Losing Sight of Women’s Rights: The Unregulated Introduction of Gender Self-Identification as a Case Study of Policy Capture in Scotland’ by Kath Murray, Lucy Hunter Blackburn and Lisa MacKenzie, published in *Scottish Affairs* 28(3). Murray et al sought to explore the legal status of women, particularly with regard to discrimination legislation, and concluded that the interests of trans women had begun to systematically erode the interests of non-trans women in Scotland. In this response, we aim to correct some of the erroneous statements made by Murray et al about legal definitions of sex and gender, and about discrimination law. In critically engaging with Murray et al’s argument we aim to build a much-needed clearer understanding of law and policy on sex and gender in Scotland, particularly as it relates to the application of the Equality Act 2010. We argue that, in that claiming that there has been policy capture in Scotland, Murray et al have neglected to contextualise ongoing debates about sex and gender in law against the backdrop of over two decades of clear legal and policy shifts across the UK. We call for researchers and others – in Scotland and elsewhere – to take care, particularly in interpreting and applying the law, especially as it applies to marginalised minority populations, so that we do not further obfuscate or mislead on important legal and social issues.

Key words: sex, gender, equality, discrimination, trans.

Sharon Cowan is the Professor of Feminist and Queer Legal Studies at the University of Edinburgh, researching in the areas of sexual violence, asylum and refugee law, and sex/gender equality. **Dr Harry Josephine Giles** is an independent researcher focussing on trans healthcare, social policy and the law. **Dr Rebecca Hower** is a postdoctoral research fellow with the Centre for Biomedicine, Self and Society, and a non-practising barrister. Her work explores the socio-legal regulation of women’s bodies. **Becky Kaufmann** is the Justice Policy Officer for the Scottish Trans Alliance project of the Equality Network. She has worked in the justice sector in both the US and Scotland for more than 25 years. **Dr Meryl Kenny** is Senior Lecturer in Gender and Politics at the University of Edinburgh and a member of the steering group of the cross-party Women5050 campaign for legal gender quotas in Scotland. Her research focuses on gender and political recruitment, and feminist institutional theory. **Sean Morris** is a dual qualified solicitor (Law Society of England & Wales 2002; Law Society of Scotland 2019). Having worked in the public and private sector, he specialises in defending employment tribunal claims and advising business on data protection and employment law. **Dr Katie Nicoll Baines** is a Research Project Manager at the University of Edinburgh, with a background in human anatomy and genetics, and now specialising in equality, diversity & inclusion in academia.

The authors wish to thank the following people for taking the time to read and comment on this article in draft form: Nicole Busby, David Cabrelli, Gillian Calder, Chloë Kennedy, Theunis Roux, and Neil Walker. We also thank the editor and anonymous reviewer for their feedback.

1. Introduction

In August 2019, Kath Murray, Lucy Hunter Blackburn and Lisa MacKenzie (hereafter Murray et al), published 'Losing Sight of Women's Rights: The Unregulated Introduction of Gender Self-Identification as a Case Study of Policy Capture in Scotland' in *Scottish Affairs* 28(3). In the main, this article sought to explore the legal status of women, particularly with regard to discrimination legislation, and concluded that the interests of trans women had begun to systematically erode the interests of non-trans women in Scotland. Their position is clearly controversial, but in this article we do not seek to engage with the philosophically contestable features of Murray et al's work. Rather, we aim to correct some of the erroneous statements made by Murray et al about legal definitions of sex and gender, and about discrimination law. In section two, we examine the concepts of sex and gender in case law and legislation, before moving on, in section 3, to gender reassignment and discrimination as set out in the Equality Act 2010 (hereafter the 2010 Act). In section 4, we examine Murray et al's claims about the sex/gender question in the Scottish census, before concluding that their analysis is inaccurate and misleading.

Our objective is not only to critically engage with Murray et al's argument but also to build a much-needed clearer understanding of law and policy on sex and gender in Scotland, particularly as it relates to the application of the 2010 Act. We argue that, in that claiming that there has been policy capture in Scotland, Murray et al have neglected to contextualise ongoing debates about sex and gender against the backdrop of over two decades of clear legal and policy shifts across the UK. We call for researchers and others – in Scotland and elsewhere – to take care, particularly in interpreting and applying the law, especially as it applies to marginalised minority populations, so that we do not further obfuscate or mislead on important legal and social issues.

2. Legal definitions of sex and gender

In this section we analyse Murray et al's position regarding the definition of sex and gender in law.

a. Sex and gender in case law

We agree with Murray et al that there is currently no single definition of sex, or gender, in law (p266).

This is not a universally shared view. For example, one commentator - Rosa Freedman - responding to the 2018 consultation on the Scottish Census, disagreed that there was no legal definition of sex (Culture, Tourism, Europe and External Affairs Committee (2018)); she argued that the legal definition of sex was clearly set out in a 1970 decision in an English marriage case, *Corbett v Corbett* ([1970] 2 All E.R.33). In that case, the court annulled a marriage between a trans woman and a man, because marriage could only be between a man and woman; the court held that since sex was fixed at birth and could not be changed, even by surgery, April Ashley remained a man for the purposes of marriage law and thus could not consummate the marriage. Mr Justice Ormrod stated that surgery cannot

‘reproduce a person who is naturally capable of performing the essential role of a woman in marriage’ ([1970] 2 All E.R. 33, at 48), i.e., heterosexual penetrative reproductive sexual intercourse.

The test for sex in *Corbett* is not a legally generalisable test, since it was made 50 years ago in the narrow context of 20th century English marriage law. As Mr Justice Ormrod himself stated in that judgment, ‘The question then becomes what is meant by the word ‘woman’ in the context of a marriage, for I am not concerned to determine the ‘legal sex’ of the respondent at large’ ([1970] 2 All E.R., at 48). As such, it is very surprising to see anyone propose that this half-a-century-old way of thinking about the definition of sex in marriage would be an appropriate source for defining sex *per se* in contemporary times. In any case, since then the European Court of Justice in *Goodwin v UK* (2002) 35 EHRR 18 held that UK law was in violation of Articles 8 and 12 of the ECHR in not allowing trans people to marry in their ‘post-operative’ sex. This in turn led to the Gender Recognition Act 2004 (hereafter GRA), which allowed trans people to change the sex marker on their birth certificates, and to get married and be legally recognised in their ‘acquired’ gender (section 1(2)), as discussed below (see also Whittle and Turner 2007).

It is also surprising to find distinct echoes of this reductive conceptualisation of woman in recent arguments made by Murray et al. For example, when they state that ‘[t]he so-called ‘gender pay gap’ is largely a ‘motherhood penalty’” (p265), Murray et al elide the fact that a considerable number of Employment Tribunal claims for equal pay relate to women not being paid equally for ‘like work’ or ‘work rated as equivalent’. A recent example of this would be the equal pay claim under consideration by the Supreme Court brought against Asda, where lower-paid store staff, who are mainly female, claim equal pay to warehouse workers, who are mainly male and higher-paid (*Asda Stores Ltd v Brierley* [2019] EWCA Civ 44 (31 January 2019), see also Davies (2019)). It is also worth noting how early research from Schilt and Wiswall (2008), for example, shows ‘a substantial and statistically significant decrease in earnings’ (up to a third) for trans women after transition, but either no change or a slight increase in earnings for trans men after they transition (p18-19), further indicating that child-bearing cannot adequately explain gender pay discrepancies. Thus, the causes of unequal pay are multi-dimensional; pay differentials are also attributable to stereotyping, resulting from the socially constructed gender roles, and historical disadvantage, neither of which are reducible to a ‘motherhood’ or ‘sex-based’ (as discussed in section 2c below) explanation for unequal pay.

b. Sex and gender in the Gender Recognition Act 2004

To reiterate, nowhere in law is there a single definition of either sex or gender. The GRA sets out the framework for changing sex and gender. A successful application to the Gender Recognition Panel results in the granting of a Gender Recognition Certificate (GRC), allowing the applicant’s sex and gender to change (section 9(1)), although nowhere does the statute define either term.

In drafting the GRA, the UK Government did not enshrine the *Corbett* definition of sex in statutory form. It responded to the European Court of Human Rights’ finding in *Goodwin*

that a purely biological definition of sex was out of step with thinking across Europe and beyond. In determining the sex of trans people, said the ECtHR, social roles and psychological traits also had to be considered (for critical discussion of the GRA see Cowan et al 2009).

In allowing a successful applicant to change the sex marker on their birth certificate, the GRA confirms that for the purposes of the law, sex *can* be changed. This shows is that the term 'sex' means different things in different contexts, and in fact may not have a meaning beyond the qualifying term preceding it (see also the recent US Supreme Court case *Bostock v. Clayton County* (590 U.S. (2020)) on the meaning of sex and gender in US employment law).

Law is sometimes created in a piecemeal and sometimes flawed way that can leave many important categories vague and imprecisely defined. It can also be interpreted in a seemingly inconsistent way, but this is because flexibility is necessary in some contexts. Concepts are sometimes left open-ended so that those interpreting and applying law can adjust meaning to the specific situation in which they are used. For example, as noted, section 7 of the 2010 Act, on the protected characteristic of gender reassignment, refers to 'physiological *or other attributes of sex*' (emphasis added). It is possible that courts in future may interpret this to mean that sex, for the purposes of the 2010 Act, is not a purely physiological concept.

Law's categories and concepts evolve. Sex and gender are two such examples. In the following sub-section, we demonstrate why sex and gender may not be as separable in law as Murray et al's claims suggest.

c. Sex and gender in the Equality Act 2010

The Equality Act 2010 applies across the whole of the UK, consolidating and updating previous UK law on discrimination such as the Race Relations Act 1965 and the Sex Discrimination Act 1975. The 2010 Act safeguards against discrimination that occurs on the basis of a protected characteristic. Currently there are 9 protected characteristics, including sex (section 11) and gender reassignment (section 7), which are the two most relevant here.

Trans people can make a claim of discrimination relying on one or both of these protected characteristics, depending on the circumstances of their case (*Brook v Tasker* 2014 (Law Centres Network 2014)). The Act protects against four basic forms of discrimination (direct, indirect, harassment, and victimisation), though Murray et al do not distinguish between these forms.

Regarding sex discrimination, Murray et al take as their definition of sex 'physical sex as observed and recorded at birth' (p264). This is clearly a genital-based definition of sex, since no simple observation at birth can record either chromosomes or definitively confirm the presence of testes, ovaries, both or neither (and sometimes simple observation of genitals is not definitive either). Murray et al say that women, for them, are the category of people who have 'F' recorded on their birth certificate, and have the biological characteristics of a female. Though they do not specify what these biological characteristics are, they refer to

‘physiological attributes’, which again is presumably related to genitals, and the ability to reproduce. They warn that anyone who might be offended by their interpretations is probably only demonstrating their point that current usage has wandered too far from the intentions of the Act and that this is the problem they want to highlight (p264).

However, the meaning of sex and gender in the 2010 Act is less stark than Murray et al’s definitions might suggest. On the question of interpretation of sex and gender, the 2010 Act says ‘woman’ is a female of any age and ‘man’ is a male of any age. Female and male are not defined in the legislation. The Act does not specifically state whether the protected characteristic of sex is based on biological characteristics, such as genitalia or chromosomes, or based on gender as a social category, or some combination of the two. But it does give some guidance. Section 7, on the protected characteristic of gender reassignment, refers to ‘physiological or other attributes of sex’ (emphasis added).

Although the 2010 Act only mentions the protected characteristic of sex, rather than gender, sex discrimination legislation has long ‘read in’ gender discrimination. That is, not only does the legislation offer protection against discrimination on what might be called biologically-linked grounds, such as pregnancy (in fact pregnancy and maternity are also explicitly protected by sections 17 and 18 of the 2010 Act as well as under sex discrimination claims), it also protects those who have been subjected to gender-based discrimination, for example relating to assumptions about who provides healthcare. In *Burden v Chief Constable of Hampshire Constabulary* WL 12591122 (2015) for example, a tribunal held that an employer’s provisions, criteria and practices, individually or cumulatively, indirectly discriminated against female employees who were more likely to have childcare responsibilities.¹ Thus, the concepts of sex and gender are so interrelated – as indeed are sex and gender types of discrimination – that often *both* are in play when we are talking about discrimination.

Inevitably, therefore, there is a certain amount of slippage between the terms ‘sex’ and ‘gender’ in the application of discrimination law, and it is not clear that the 2010 Act does, or was ever intended to, categorically separate sex and gender in the way that Murray et al imply. In any event, even if Act was ever intended to define clear, distinct concepts, no decision-maker can rely on the law to remain static in meaning, in the hope that society will do the same. Judicial decisions do sometimes depart from existing law: this was how the exemption against rape in marriage was abolished in Scotland (*S v HMA* 1989 SCCR 248). Therefore, a law, whether statute or common law, and irrespective of the original intention of its creators, is always open to reinterpretation.

This is not to argue that there are no biological differences between people, or indeed that there is no difference between physiological characteristics on the one hand (such as having/not having a womb) and socialised traits on the other (whether someone is/is not a good parent). Rather, our point is that not everything hangs on or is reducible to biology, particularly where biology means physiology. This is particularly true in discrimination law, where the rules, and how they are applied in practice, reflects the complexity of experience.

¹ See <https://1mcb.com/police-sergeant-secures-reinstatement-following-successful-indirect-sex-discrimination-claim/>

3. Sex and gender discrimination and exceptions under the Equality Act 2010

In this section we evaluate Murray et al's claims about the 2010 Act, beginning with their understanding of sex discrimination, before moving on to their representation of the exceptions to protections against discrimination. Note that the 2010 Act applies across all jurisdictions of the UK.

a. Sex discrimination

Murray et al state that: 'From a legal and policy perspective, the argument that a trans woman should be treated as a woman sits uneasily with the Equality Act 2010, as it renders sex irrelevant as a protected characteristic' (p266).

It is not clear what is meant here. This statement seems to follow from the assumption that the Act incorporates the definition of sex adopted by Murray et al (discussed above in section 1), despite no conclusive evidence to support this assumption. We suppose they mean that treating a trans woman as a woman somehow undermines the sex-based protections for non-trans women, so let us proceed on that basis.

Since the Gender Recognition Act was introduced in 2004, a trans woman with a gender recognition certificate is treated as a woman. Section 9(1) says: 'Where a full gender recognition certificate [GRC] is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)'. Clearly, then, a trans woman with a GRC can claim sex discrimination protections under the Equality Act, as a woman.

Even a trans woman *without* a GRC can be protected from sex discrimination under the 2010 Act. Section 13 of the 2010 Act, which contains the definition of *direct* discrimination, covers cases where less favourable treatment occurs because someone is wrongly thought to have a protected characteristic (commonly referred to as 'discrimination by perception' or 'perceived discrimination'). For example, imagine a service provider who does not know that a woman is trans, but perceives her as non-trans, and treats her less favourably than a man. This trans woman could claim sex discrimination, even if she does not have a GRC, because she has been perceived as a woman and treated less favourably on that basis.

It is not obvious why the fact that these legal protections are available to trans women, whereby trans women can bring discrimination claims for the protected characteristic of sex, 'renders sex irrelevant as a protected characteristic', as Murray et al claim. Perhaps their intended meaning is that the Act, in allowing trans women to access sex discrimination protections, precludes non-trans women from accessing the same protections. But this is plainly not so. Allowing a trans woman to claim sex discrimination does not hinder the operation of the sex-based protections for anyone else.

It is possible that Murray et al are arguing that a trans woman should not be treated as a woman – i.e. should be denied the protections of the 2010 Act – if her presence poses some sort of risk or threat to other women, for example in a sex segregated space, such as a

women's shelter. Again, even if that were true, it is not clear how this argument 'renders sex irrelevant as a protected characteristic' under the Act.

Under Schedule 3 paragraph 28 of the 2010 Act, a service provider can offer a single-sex service without contravening the provisions that protect trans women on the basis of gender reassignment, if doing so is 'a proportionate means of achieving a legitimate aim'. This allows service providers to exclude trans women, in certain circumstances, whether or not they have a GRC. We will explore these exceptions to the general protections against discrimination more fully in the next sub-section. For now, the point we wish to make is that, irrespective of whether or not a trans woman is excluded from service provision, it is not evident how this undermines the general operation of the sex-based legal protections, or renders them 'irrelevant' for non-trans women.

Murray et al's sentence would make sense if rewritten as follows: 'From a legal and policy perspective, the argument that a trans woman should be treated as a woman sits uneasily with the Equality Act 2010 as it renders *birth genitals* irrelevant as a protected characteristic'. But as we have already said, sex discrimination protections extend to more than just anatomy-based instances of discrimination. Read in the only way that makes sense, Murray et al's argument either ignores the gender-based aspects of sex discrimination claims, or reduces all forms of gender-based discrimination (such as the gender-pay gap) to sex-based claims. This reduction is also evident in the following sentence: 'Under section 11, sex is a protected characteristic. For almost everyone this is biological sex, as originally recorded on the person's birth certificate' (p267). The sentence implies only sex, and not gender, is protected by sex discrimination legislation. It would be a sorry and retrograde state of affairs if that were true, but it is self-evident that UK law and how it is applied in practice is much more complex, and much better equipped, to help protect against different sorts of sex discrimination.

b. Discrimination exceptions

We spend considerable time analysing Murray et al's argument here because it is a technical area of law that they and others have misunderstood or misrepresented, and it is important to clarify the current law as it stands.

i. Legislation and the Statutory Code of Practice

Murray et al claim that 'The [2010] Act **does not provide that those with the characteristics of gender reassignment have a general right of access** to single-sex spaces and services based on gender self-identification, despite a common and influential assumption that it does' (p268, emphasis added).

In effect, the protections enshrined in the 2010 Act do just that, as is explicated by the provisions of the Act itself, and the Statutory Code of Practice: Services, Public Functions, and Associations, developed by the Equality and Human Rights Commission (EHRC, 2011) for service providers and employers.

Tellingly, the 2010 Act provisions allowing for trans women to be excluded from services, without it constituting discrimination, are called ‘exceptions’. Paragraphs 26 and 27 of Schedule 3 of the Act deal with sex discrimination exceptions, and paragraph 28 deals with gender reassignment exceptions. The default position, therefore, is that you cannot discriminate. If they disagree, Murray et al might have explained the basis on which they have arrived at their understanding of the legislation. The ‘common and influential assumption’ that they describe is in fact authoritative statutory guidance.

Schedule 3 paragraph 28 says:

(1) A person does not contravene section 29 [provision of services], so far as relating to **gender reassignment discrimination**, only because of anything done in relation to a matter within sub-paragraph (2) if the conduct in question is a proportionate means of achieving a legitimate aim.

(2) The matters are—

- (a) the provision of separate services for persons of each sex;
- (b) the provision of separate services differently for persons of each sex;
- (c) the provision of a service only to persons of one sex.

A service provider can therefore lawfully exclude a trans woman only if they can show that the exclusion relates to the matters mentioned in paragraph 28 (2), *and* that it is a proportionate means of achieving a legitimate aim. This makes the exceptions rather narrow.

Under Schedule 3 paragraphs 26 and 27, the **exceptions relating to sex discrimination** in the provision of separate services and single sex services are even narrower. The service provider must again show that providing separate or single-sex services is a proportionate means of achieving a legitimate aim. But under paragraph 26, in providing separate services for the sexes, they also have to show that providing joint services would be less effective. Further, according to paragraph 26 (2) (the provision of separate services differently), the service provider must show that it is not reasonably practicable to provide the service otherwise than as a separate service provided differently for each sex. And under paragraph 27 (single-sex services), the service provider also has to meet all of the conditions set out under sub-paragraphs 2-7.

Thus, the provisions of the 2010 Act set in place stringent criteria that must be met in order for a service provider to exclude anyone (either on the basis of gender reassignment or sex) from separate or single-sex services. The Statutory Code of Practice is also clear, at paragraph 13.57, that:

If a service provider provides single- or separate sex services for women and men, or provides services differently for women and men, **they should treat transsexual people according to the gender role in which they present.** (EHRC 2011 para 13.57, emphasis added).

While not legally binding, the Statutory Code of Practice has authoritative force, and must be considered by a tribunal or court when deciding on discrimination claims. If the Code is ignored by a service provider an adverse inference can be drawn.

In practice, the exceptions are used rarely. In fact, women's services in Scotland that provide shelter and other sex-specific services have been trans-inclusive for around 7 years (Stonewall 2018; Scottish Women's Sector 2018). This is not to say that the exceptions could never be relied upon, but as Murray et al rightly note (p268), Dunne and Sharpe (2019) have stated that the threshold of 'legitimate' and 'proportionate' is high. Murray et al describe this as merely Dunne and Sharpe's 'understanding'. Yet Dunne and Sharpe's 'understanding' is based on what the Code of Practice for Service Providers actually states:

[A]ny exception to the prohibition of discrimination must be applied as **restrictively as possible** and the denial of a service to a transsexual person should **only occur in exceptional circumstances**. A service provider can have a policy on provision of the service to transsexual users but should **apply this policy on a case-by-case basis** in order to determine whether the exclusion of a transsexual person is proportionate in the individual circumstances... Also, the provider will need to **show that a less discriminatory way to achieve the objective was not available**. (2011 para 13.60, emphases added).

This is known as the proportionality test, i.e. 'a proportionate means of achieving a legitimate aim' (*Bilka-Kaufhaus GmbH v Weber von Hartz* (C170/84) [1986] 2 CMLR 701, ECJ), and is well established in UK law (see for example *Allonby v Accrington & Rossendale College and others* [2001] IRLR 364 (HL)). This means in practice that, as the Code states, a service provider should take a case-by-case approach, rather than making blanket exceptions. Given the dearth of case law in this area, what case-by-case means in practice in the trans context has not yet been tested in court in the ten years that the 2010 Act has been in force.

Neither the detailed legislative provisions described above, nor the authoritative Code of Practice are cited by Murray et al. By depicting Dunne and Sharpe's position (that the bar for establishing an exception is high) as an 'understanding', they risk misleading readers unfamiliar with the law. Their failure to cite applicable legislation and guidance, and/or research/authorities in support of their position, suggests of a lack of rigour in their scholarship and, regrettably, results in an argument wanting in accuracy and balance.

When they also state:

In practice, many organisations and service-providers within Scotland already operate on the basis of gender self-identification, thereby ignoring the protections based on sex available in the Equality Act. For some, this is a conscious choice to provide 'inclusive' services, although such decisions may be shaped by Scottish Government funding arrangements that are conditional on including transwomen (Engender, 2018a: para. 2.4) (p269),

Murray et al imply that the organisations concerned are exercising a discretionary choice. However, by treating trans people according to the gender in which they present, *organisations are simply applying the law*. In addition, the Engender reference cited by the authors is not only wrong (there is no paragraph 2.4), it also omits a clarifying caveat from Engender² that ‘our funding from Scottish Government does not require any of us to adopt any particular policy positions, and that we have autonomy with regard to the content of our policy advocacy’. This appears to be either misrepresentation, or poor academic research on Murray et al’s part.

ii. Equality and Human Rights Commission (EHRC) guidance on the Equality Act exceptions

Murray et al go on to argue that Dunne and Sharpe’s view – that the bar for establishing an exception is high – and the view that inclusion of trans people is a settled matter, is inconsistent with EHRC advice (p268).

The EHRC advice Murray et al refer to is a paragraph from an EHRC (2018) statement, which reads:

Under the Act, the **protection from gender reassignment discrimination** applies to all trans people who are proposing to go, are undergoing or have undergone (part of) a process of gender reassignment. At the same time, **a trans person is protected from sex discrimination** on the basis of their legal sex. This means that a trans woman who does not hold a GRC and is therefore legally male would be treated as male for the purposes of the sex discrimination provisions, and a trans woman with a GRC would be treated as female. **The sex discrimination exceptions in the Equality Act therefore apply differently to a trans person with a GRC or without a GRC** (emphasis added).

First, with all due respect to the EHRC, this paragraph inaccurately represents the 2010 Act, not least because, as noted above, the 2010 Act extends to direct discrimination based on perception, and so any trans woman, with or without a GRC, who was treated unfairly on the basis that she was a woman would be able to claim sex discrimination.

It is misleading of Murray et al to refer solely to this statement and not to the 2010 Act or the Statutory Code of Practice. The statement has less legal weight than legislation or the Code of Practice. It is to statutory authorities that courts and service providers ought to refer in the first instance, not an (erroneous) statement indicative of the EHRC's current position.

Murray et al claim that the Dunne and Sharpe view (i.e. that the bar for establishing an exception is high) is inconsistent with the EHRC statement. However, they do not explain *why* they think this. Indeed, the extract they quote from the statement does not say anything about the bar for establishing exceptions. Neither do they explain why the view

² See <https://www.engender.org.uk/news/blog/letter-to-joan-mcalpine-msp/>

that the inclusion of trans people is a settled matter is inconsistent with the EHRC statement (p268). The extract they quote from the statement does not speak to this point either.

As already noted, the inclusion of trans people *is* a legally settled matter. Trans people are not to be discriminated against unless there is reason to do so under an exception to that general rule. As yet, there is little case law examining how the exceptions are to be applied, and it may be, of course, that the absence of such case law suggests that the legal position is straightforward, and that how the law applies in practice has yet to give rise to any issues or concerns for service providers and service users.

Importantly, Murray et al further misunderstand or misrepresent the EHRC statement when they state that it 'indicates **only those with a GRC have any basis for seeking admission to single-sex provision**' (p268, emphasis added). The statement – and crucially, the Statutory Code of Practice and the 2010 Act itself - indicate no such thing.

Trans women can seek admission to a single-sex service regardless of whether they hold a GRC. As already pointed out, the Statutory Code of Practice at paragraph 13.57 says trans women seeking services are to be treated according to how they present rather than on the basis of their possession of a GRC: 'If a service provider provides single- or separate sex services for women and men, or provides services differently to women and men, they should treat transsexual people according to the gender role in which they present' (Code of Practice p. 197, para 13.57). The Code does not say that a trans person must have a GRC to be treated in this way.

Although, as explained above, trans women may be refused access to a service under very narrow exceptions, the Equality Act says nothing about GRCs in its exceptions, and neither does the Code; in other words, the law does not distinguish here between those who have GRCs and those who do not. Trans people can access services available to the gender in which they present, regardless of whether or not they have a GRC, and they can also be excluded under an exception, regardless of whether or not they have a GRC (see also Sharpe, 2020).

The EHRC statement that Murray et al refer to does identify a distinction in relation to the protections from sex discrimination, depending on whether or not the claimant has a GRC. But there are issues with the accuracy and clarity of the EHRC statement itself here. The paragraph in question, quoted above, begins by referring to protections from discrimination for trans people on the basis of the protected characteristic of *gender reassignment*, where establishing a claim is not dependent upon the trans person having a GRC. Then it moves on to the separate issue of discrimination against trans people on the basis of the protected characteristic of *sex*. Here it says that the protections differ according to whether a trans person has a GRC or not (and in doing so omits to consider perceived discrimination). After stating that a trans person is protected from sex discrimination on the basis of their legal sex, it confusingly concludes that 'The sex discrimination exceptions in the Equality Act *therefore* apply differently to a trans person with a GRC or without a GRC' (emphasis added). But this is incorrect. As explained above, the Schedule 3 exceptions relevant to sex discrimination (contained in paragraphs 26 and 27) under which a service provider might, in

certain limited circumstances, lawfully exclude a trans person contain no mention of GRCs. And the logical connection implied by ‘therefore’ in the final sentence is non-existent.

It is essential to highlight this crucial point, because the EHRC’s inaccurate statement that ‘[t]he sex discrimination exceptions in the Equality Act therefore apply differently to a trans person with a GRC or without a GRC’, is the basis of Murray et al’s erroneous claim that ‘only those with a GRC have any basis for seeking admission to single-sex provision’ (p268).

In the next section we focus on Murray et al’s claims about the Scottish Census 2021.

4. The Scottish Census 2021

Murray et al worry that a ‘precedent’ might be set for how sex is understood as a policy and legal category in Scotland in the future (p263), if the Scottish Census 2021 includes a question about sex that allows people to answer in the sex they identify with, irrespective of the sex marker on their birth certificate.

Historically, the census has recorded the sex of respondents. Previous censuses in both England and in Scotland asked respondents to record their (binary) sex, and allowed trans people to answer the question in a way that reflects their self-identified gender regardless of the sex as recorded on their birth certificate (for discussion of the English census see Sullivan (2020) and Hines (2020)). This has been accepted practice for two census cycles and was formally codified in the guidance for the sex question for the 2011 Scottish census.

During committee hearings in the Scottish Parliament on a bill to make proposed questions on sexual orientation and transgender status/history in the 2021 census voluntary, concerns were raised about the practice of allowing trans people to self-identify on the census (Culture, Tourism, Europe and External Affairs Committee 2019, paragraphs 84-89). Self-identification was opposed for various reasons, including the fear that we would lose potentially important sex-based data and the possible ‘significant implications for the legal understanding of sex’ or ‘women’s interests’ (Murray et al, p272).

It is not clear what the significant implications would be here since Murray et al do not explain. It may be that they fear a precedent will be set, one that will not work in other contexts. But, as suggested above in section 2, different areas of law at different times have taken different approaches to the meaning of sex – including only biology, as in the case of *Corbett*, or some social and psychological traits, as in the case of *Goodwin*, and it may well be that in other cases sex and gender are intimately interwoven, as in intersectional discrimination cases (section 14 of the 2010 Act). There is no reason to think that the law would or should be forced to choose one single definition of sex or gender that will stand in every context.

What Murray et al would seem to prefer the census to do is ask respondents to state the sex that was recorded on their birth certificate. This means we are asking people to record the sex that the doctor or nurse deemed them to be, having inspected their external genitals post-partum, usually in the first few days after birth. This is the definition of sex that the

authors themselves use in the article (p264). But this is *genital* sex, which clearly *can* be changed.

Therefore, if 'biological' sex cannot be changed, as some feminists, such as Murray et al, would argue, biological sex must mean something more than genital sex – most probably some combination of genitals, hormones, gonads and chromosomes. Note of course that these are constituent factors currently considered to be relevant to the designation of sex, but this has not always been the case; science has shifted its idea of what constitutes sex over time (see for example Ainsworth 2015). This process is ongoing, and it is unlikely that science – and /or other discourses – will 'freeze' their idea of what constitutes sex for all time. In any case, very few of us actually know what combination of these characteristics we have, unless we have been tested, for example, for a sex chromosome linked condition, such as haemophilia, or where there is evidence of 'ambiguous' or a combination of sex organs.

Ascertaining someone's sex, for the purposes of Murray et al's argument, then, just means knowing what the outward appearance of their genitals was when they were born. Of what use this is to the census remains to be seen. But it seems overly reductive to ask people to identify themselves solely on the basis of externally visible body parts.

In setting out an argument in favour of a sex rather than gender question in the Scottish census, Murray et al have not offered as clear an analysis as we might have hoped. For example, they state:

While badged as inclusive, the current attempt to put the principle of gender self-identification on a statutory basis risks setting a legal precedent that will challenge the very basis of the Equality Act 2010. If the argument that it is wrong in principle for organisations to identify a person's legal or biological sex is applied more widely, it will make the practical operation of the Act unworkable in relation to the protected characteristic of 'sex' (p275).

There are several problems with this argument, and we will examine each sentence in turn.

a. 'Gender self-identification on a statutory basis'

In the first sentence, Murray et al say that the 'current attempt to put the principle of gender self-identification on a statutory footing' is a 'precedent' that 'challenges the basis of the EA 2010.'

Gender self-identification has had a statutory footing since long before the Equality Act 2010.

Before the 2010 Act, the Sex Discrimination Act 1975 had been amended by regulation in 1999 to include gender reassignment within 'sex' discrimination claims (Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102) (Gender Reassignment Regulations)). Those were prompted by the ECJ decision in *P v S and Cornwall County Council* [1996] IRLR 347. The Court held that Article 5(1) of the EU's Equal Treatment

Directive (76/207/EEC) extended the right not to be discriminated against on grounds of sex to discrimination arising out of gender reassignment, since to dismiss a person on the ground that they intended to undergo, or had undergone, gender reassignment was to treat them unfavourably by comparison with persons of the sex to which they were deemed to belong, before their reassignment. In consequence, those undergoing gender reassignment have been able to bring a claim of sex discrimination since 1999. Those presenting in a self-identified gender were protected on a statutory footing within the category of sex. This shows a long line of legal authority, stemming from European law, rather than a history of Scottish ‘policy capture’.

It follows that Murray et al’s first sentence does not make sense, and in addition gives a false impression of conflict between a census that introduces protections for self-identifying trans people (when in fact these protections have been around for a long time), and the 2010 Act (which already protects trans people in their self-identified gender).

b. If we can’t identify sex ... does it makes the Act unworkable?

Murray et al’s second sentence reads: ‘If the argument that it is wrong in principle for organisations to identify a person’s legal or biological sex is applied more widely it will make the practical operation of the Act unworkable in relation to the protected characteristic of ‘sex’.

It is not clear what organisations Murray et al are referring to here. In practice, most institutions and organisations do not as a matter of course identify a person’s legal or biological sex. More often than not, they identify a person’s sex through perception, and/or through self-identification. For example, an employee is required to show either a birth certificate or a passport / visa / residence permit, to demonstrate a right to work in the UK,³ but there is no way to tell whether a birth certificate or passport is the original document or one amended through the gender recognition process, and no one is under an obligation to confirm or deny whether the sex marker on their birth certificate is the same now as it was originally (under s22 of the GRA, it is also an offence to share confidential information about someone’s GRC without their consent – for discussion see Sharpe, 2020).

Again, it is not obvious what Murray et al mean when they write that not being able to ‘identify a person’s legal or biological sex...*make(s) the practical operation of the Act unworkable in relation to the protected characteristic of “sex”*’ (emphasis added). Since they use sex in a narrow ‘biological’ sense (see above in section 1), the sentence implies that the Act only protects sex discrimination claims that relate directly to genital sex recorded on the birth certificate, which as we have seen is incorrect. It is unclear what is meant by ‘unworkable’ here, or why not being able to ‘identify’ sex might make gender-based or genital-based discrimination ‘unworkable’. The meaning is not made any clearer by the context, or the following sentences, where Murray et al move on to make further, different points that shed no light on the issue.

³ See <https://www.nidirect.gov.uk/articles/evidence-support-your-right-work-uk>.

The question must be asked then, what would the actual impact be of using sex self-identification on the Scottish census? Requiring all trans people to answer the census using only their sex assigned at birth or as registered on their birth certificate would force some to answer in a manner that fundamentally denies the reality of their everyday lives. This would lead to an erosion of trust by trans people in both the census and the Scottish Government that authorised it. The lack of trust would also almost certainly mean that trans people would not feel safe to honestly answer a question about their trans status/history. In those circumstances, it would be impossible to predict how many trans people would follow the guidance, or simply not answer the census at all.

Conversely, allowing self-identification would greatly improve the probability that trans people would answer both the sex and the trans status/history question accurately. This would still allow a service provider like the NHS to take the total number of people who answered female and said yes to the trans status/history and subtract this number from the total number of people who answered female, with simple maths determining roughly how many people were born with cervixes and need to be reminded to get a smear test.

In January 2020, National Records of Scotland, the organisation which manages the Scottish Census, released a statement confirming that they were recommending keeping a binary sex question. They also recommended a single question for trans people to record their trans status (NRS 2019, 28, 32). The census regulations were passed and came into force on 12 March 2020, with the NRS recommended questions included.⁴

5. Conclusion

There are many reasons to be concerned about Murray et al's article. Some relate to its lack of academic rigour. Other than one brief reference to a chapter in an edited collection, it does not cite peer-reviewed references; instead references are made only to news articles, personal blogs and institutional reports. This is a serious concern in an article advancing arguments that rely on emphatic claims such as '[g]ender identity may be understood as either a person's strong sense of how 'masculine' or 'feminine' one is, or a person's own belief about whether one is a man, woman or non-binary' (p265). This claim is not evidenced through any peer-reviewed literature about how trans people actually regard gender identity, or how gender identity operates or is regulated in law. Instead, Murray et al cite Stock (2018) as their source here, though no such reference appears in the bibliography. The 2019 Stock reference that is cited is not a peer reviewed source but there are countless peer reviewed publications that discuss these issues (see, diversely, for example, Koyama (2003), Whittle and Turner (2007), Bettcher (2009), Serano (2016), Jenkins 2018). The absence of peer-reviewed sources also undermines the authority of empirical claims such as, for example, '[t]he so-called "gender pay gap" is largely a "motherhood penalty", while sexual violence and domestic abuse can be related to the lower status ascribed to the female class' (p265, where the referenced source is a TUC document). There are also glaring inaccuracies and discrepancies within the article. Clearly it lacks the kind of thoroughgoing review of literature or attention to detail that academic rigour demands.

⁴ See <https://www.scotlandscensus.gov.uk/census-order-0>.

Murray et al's general argument is that 'policy capture on gender identity has undermined the rights and interests of women' (p265). This is weakly supported: they fail to clearly identify any way in which protections from sex discrimination have been undermined. Their legal arguments are reliant upon misinterpretations and selective quotations from statute and case law, without considering alternative interpretations or undergoing more thorough analyses. Further they give no consideration to how institutions in Scotland have been adhering to legal protections for decades.

Authors in this field should exercise care when making categorical statements on these issues, in order to help prevent erroneous interpretations that jeopardise the protection of those who are vulnerable and most exposed to unlawful discrimination. One would hope that a common objective of those working on equality might be to ensure that people better appreciate the protections in the 2010 Act. With this objective in mind, we should all strive towards helping improve the general understanding of how the law in this area has been – and should be – interpreted.

Trans people across all parts of the UK, including those who self-identify, have had legal protections against discrimination for many years. They have been protected from discrimination based on how they present (not their genitals) since gender reassignment was added to the Sex Discrimination Act 1975 as a specific ground of protection in 1999 (by the Sex Discrimination (Gender Reassignment) Regulations 1999). The Equality Act 2010 is consolidating and reforming legislation that built upon these previous laws. To speak of recent 'policy capture' in Scotland ignores the gradual shift in law and policy across the UK over at least the last two decades, and the accompanying processes of scrutiny and consultation, particularly with respect to the GRA and the 2010 Act.

Trans people across the UK - who are a small and vulnerable minority of the population - have had legal protections against discrimination for many years. They have been protected from discrimination based on how they present - i.e. on the basis of self-identification (not their genitals) - since gender reassignment was added to the Sex Discrimination Act 1975 as a specific ground of protection (by the Sex Discrimination (Gender Reassignment) Regulations 1999). The Equality Act 2010 is consolidating and reforming legislation that builds upon these previous laws. We have argued at length above, pointing to specific examples, that Murray et al.'s arguments about the application of the Equality Act 2010 are not built on rigorous scholarship but on a selective reading and misinterpretation of the relevant law. We do not agree with their conclusion that recent 'policy capture' demonstrates 'single-minded ideologically-driven lobbying' that threatens 'democratic policy making' in Scotland (p285), since this representation ignores the gradual shifts in law and policy across the UK over at least the last two decades, and, particularly with respect to the GRA and the 2010 Act, the processes of scrutiny and consultation that accompanied them.

References

Ainsworth, C. (2015). Sex, Redefined. *Nature* <https://www.nature.com/articles/518288a>, 18 February 2015

Bettcher, T. (2009). Trans identities and first-person authority. In L. Shrage (ed.), *You've Changed: Sex Reassignment and Personal Identity*, 98–120. Oxford: Oxford University Press.

Cowan, S. Sandland, R. and Sharpe, A. (2009). Debate and dialogue – The Gender Recognition Act 2004. *Social and Legal Studies*, vol. 18(2) 241-263

Culture, Tourism, Europe and External Affairs Committee. (2019). Stage 1 Report on the Census (Amendment) (Scotland) Bill. Available at <https://sp-bpr-en-prod-cdnep.azureedge.net/published/CTEEA/2019/2/7/Stage-1-Report-on-the-Census--Amendment---Scotland--Bill/CTEEAS052019R1.pdf>.

Culture, Tourism, Europe and External Affairs Committee. (2018). Census (Amendment) (Scotland) Bill - supplementary submission from: Prof. Rosa freedman, University of Reading. Available at: www.parliament.scot/S5_European/Inquiries/CTEEA_CensusBill_ProfFreedmanRosa_CTEEA_S5_18_CB_24.pdf

Davies, C. (2019). Asda shopworkers win landmark ruling in equal pay dispute. Available at: <https://www.theguardian.com/society/2019/jan/31/asda-shopworkers-win-landmark-ruling-equal-pay-dispute>

Dunne, P. and Sharpe, A. (2019) Gym use and changing rooms: the illegality and chilling effect of (trans)gender segregation. Available at <https://ohrh.law.ox.ac.uk/gym-use-and-changing-rooms-the-illegality-and-chilling-effect-of-transgender-segregation/>.

Equality and Human Rights Commission. (2011). Services, Public functions and Associations: Statutory Code of Practice. Available at <https://www.equalityhumanrights.com/en/publication-download/services-public-functions-and-associations-statutory-code-practice>

Equality and Human Rights Commission. (2018). Our statement on sex and gender reassignment: legal protections and language. Available at: <https://www.equalityhumanrights.com/en/our-work/news/our-statement-sex-and-gender-reassignment-legal-protections-and-language>.

Hines, S. (2020). Counting the cost of difference: a reply to Sullivan. *International Journal of Social Research Methodology*. Available at: <https://doi.org/10.1080/13645579.2020.1768344>

Jenkins, K. (2018). Toward an account of gender identity. *Ergo: an Open Access Journal of Philosophy*, vol. 5(27). Available at: <http://dx.doi.org/10.3998/ergo.12405314.0005.027>.

Koyama, E. (2003). The Transfeminist Manifesto. In R. Dicker and A. Piepmeier (eds.) *Catching A Wave: Reclaiming Feminism for the Twenty-First Century*, 244-262. Boston: Northeastern University Press.

Law Centres Network. (2014). Kirklees Law Centre wins landmark transgender discrimination case. Available at:
<https://www.lawcentres.org.uk/policy/news/news/kirklees-law-centre-wins-landmark-transgender-discrimination-case>

Murray, K., Hunter Blackburn, L., and MacKenzie, L. (2019). Losing sight of women's rights: policy capture and public policy. *Scottish Affairs*, vol. 28(3) 262-289.

Murray, K. and Hunter Blackburn, L. (2019). Losing sight of women's rights: policy capture and public policy. Holyrood. 29 April 2019. Available at
https://www.holyrood.com/comment/view,losing-sight-of-womens-rights-policy-capture-and-public-policy_10632.htm.

National Records of Scotland. (2019). Scotland's Census 2021 Sex Question Recommendation Report. Available at:
[https://www.scotlandscensus.gov.uk/documents/Scotland's%20Census%202021%20-%20%20Sex%20question%20recommendation%20report%20\(2\).pdf](https://www.scotlandscensus.gov.uk/documents/Scotland's%20Census%202021%20-%20%20Sex%20question%20recommendation%20report%20(2).pdf)

Serano, J. (2016). *Whipping Girl: A Transsexual Woman on Sexism and the Scapegoating of Femininity* (2nd ed.). New York: Seal Press.

Sharpe, A. (2020). Will gender self-declaration undermine women's rights and lead to an Increase in harms? *Modern Law Review*, vol. 83(3). Available at
<https://onlinelibrary.wiley.com/doi/full/10.1111/1468-2230.12507>.

Schilt, K. and Wiswall, M. (2008). Before and after: Gender transitions, human capital and workplace experiences. *The B.E. Journal of Economic Analysis & Policy*, vol. 8(1) 1-28. Available at <https://www.degruyter.com/view/journals/bejeap/8/1/article-bejeap.2008.8.1.1862.xml.xml>

Scottish Women's Sector. (2018). Review of the Gender Recognition Act 2004: a Consultation – Scottish Women's Sector Response. Available at:
<https://www.closethegap.org.uk/content/resources/Scottish-Womens-Sector-response-to-the-consultation-on-proposed-changes-to-the-Gender-Recognition-Act.pdf>

Stonewall. (2018). Supporting trans women in domestic and sexual violence services: Interviews with professionals in the sector. Available at:
https://www.stonewall.org.uk/system/files/stonewall_and_nfpsynergy_report.pdf;

Sullivan, A. (2020). Sex and the census: why surveys should not conflate sex and gender identity. *International Journal of Social Research Methodology*. Available at:
<https://doi.org/10.1080/13645579.2020.1768346>

Whittle, S. and Turner, L. (2007). 'Sex changes'? Paradigm shifts in 'sex' and 'gender' following the Gender Recognition Act? *Sociological Research Online*, vol. 12 (1). Available at <http://www.socresonline.org.uk/12/1/whittle.html>, doi:10.5153/sro.1511.